

PP v. KAO CHE JEN

HIGH COURT SABAH & SARAWAK, KUCHING
ALWI ABDUL WAHAB JC
[CRIMINAL REVISION NO: KCH-43-1-5-2015]
25 MAY 2015

CRIMINAL PROCEDURE: *Revision – Powers of – Application for court to exercise powers of revision Magistrate’s direction for prosecution to close its case – Failure to secure attendance of witness issued with medical certificate (MC) – Whether Magistrate erred in law when directing prosecution to close its case when there was one remaining witness – Power to institute and discontinue criminal proceedings – Whether Deputy Public Prosecutor empowered to exercise rights and power vested in Public Prosecutor – Whether MC tendered through prosecution should be accepted by court – Whether there was reason to doubt validity of MC – Whether prosecution allowed to adduce further evidence by calling last witness – Criminal Procedure Code, ss. 325, 376(3)*

CRIMINAL PROCEDURE: *Prosecution – Prosecution’s case – Failure to secure attendance of witness issued with medical certificate (MC) – Magistrate directed prosecution to close its case – Application for court to exercise powers of revision against direction of Magistrate – Whether Magistrate erred in law when directing prosecution to close its case when there was one remaining witness – Power to institute and discontinue criminal proceedings – Whether Deputy Public Prosecutor empowered to exercise rights and power vested in Public Prosecutor – Whether MC tendered through prosecution should be accepted by court – Whether there was reason to doubt validity of MC – Whether prosecution allowed to adduce further evidence by calling last witness – Criminal Procedure Code, ss. 325, 376(3)*

The respondent had been charged under s. 409 of the Penal Code and claimed trial to the charge. During the trial proceedings, the prosecution informed the court that one Ong Jin Ek who had been subpoenaed as witness was issued with a medical certificate (‘MC’) from a private clinic which certified that he was unfit to perform his duties for two days *ie*, 13 and 14 April 2015. The Magistrate, however, ordered the prosecution to secure the attendance of Ong Jin Ek on 14 April 2015. As the attendance of Ong Jin Ek could not be secured on 14 April 2015, the prosecution applied for adjournment of the case. In refusing to grant the prosecution’s application for an adjournment, the Magistrate directed the prosecution to close its case. As such, the prosecution applied to the High Court to exercise its power of revision under s. 325 of the Criminal Procedure Code (‘CPC’) against the direction given by the Magistrate for the prosecution to close its case. Hence this hearing. The issues that arose before the court were (i) whether the direction made by the Magistrate for the prosecution to close its case was correct according to the law; and (ii) whether the MC tendered by Ong Jin Ek through the prosecution could be accepted by the court.

A Held (allowing prosecution's application):

(1) It was wrong in law for the Magistrate to direct the prosecution to close its case bearing in mind that there was one last remaining witness, Ong Jin Ek, whom prosecution wished to call. There was a valid reason for Ong Jin Ek to be absent on 14 April 2015 for he was being issued with the MC. The power to institute and discontinue criminal proceedings rests solely in the hands of the Attorney General being the Public Prosecutor. The DPP, being an alter ego of the Public Prosecutor, was empowered to exercise all or any rights and power vested in or exercisable by the Public Prosecutor (s. 376(3) of the CPC). (para 24)

(1a) There was no indication by the prosecution to close its case, but rather it was the prosecution's intention to call its last witness, Ong Jin Ek, if its application for adjournment was allowed. The best thing the Magistrate should do was to give a short adjournment or last adjournment to enable the prosecution to produce its last witness. After all, the burden is on the prosecution to prove the guilt of the accused by adducing evidence through its witnesses before the court could come to a finding of no case to answer. (para 26)

(2) The claim that Ong Jin Ek paid a minimal fee of RM10 to obtain the MC was not proven by way of evidence. Neither was there any evidence laid to prove that the MC was obtained for all intents and purposes of avoiding from giving evidence in court. Upon looking at the MC on its face value, it was clearly stated that Ong Jin Ek was unfit for the proper performance of his duties. There were remarks which specified the ailments, namely "fever, headache, gastroenteritis" and signed by one Dr Chong Liung Kong. There was no reason to doubt the truth of the MC. Thus, in exercise of this court's revisionary power, the Magistrate was directed to allow the prosecution to adduce further evidence by calling its last witness. (para 27)

G Case(s) referred to:

Chong Fook Fatt v. PP [2003] 8 CLJ 137 HC (*refd*)

Goh Keat Peng v. PP [2001] 2 CLJ 498 HC (*refd*)

Karpal Singh & Anor v. PP [1991] 2 CLJ 1458 SC (*refd*)

Liaw Kwai Wah & Anor v. PP [1987] 1 CLJ 35; [1987] CLJ (Rep) 163 SC (*refd*)

PP v. Kulasingam [1974] 1 LNS 118 HC (*refd*)

H *PP v. Zainuddin Sulaiman & Ors* [1986] 1 CLJ 468; [1986] CLJ (Rep) 232 SC (*refd*)

Legislation referred to:

Criminal Procedure Code, ss. 325, 376(1), (3)

Federal Constitution, art. 145(3)

Penal Code, s. 409

I *For the prosecution - Muhammad Tajul Aariffin Musa; DPP*

For the respondent - Roger Chin (Lim Heng Choo & Stephen Sia with him); M/s Lim & Lim Advocs

Reported by Suhainah Wahiduddin

JUDGMENT

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Alwi Abdul Wahab JC:**Introduction**

[1] This is an application by the prosecution ('the applicant') for this court to exercise its power of revision under s. 325 of Criminal Procedure Code ("the CPC") against the direction given by the learned Magistrate for the prosecution to close its case on 14 April 2015. This application for revision was made *vide* the applicant's letter dated 16 April 2015.

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The Facts Leading To This Application

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[2] On 4 February 2015, Kao Che Jen ('the respondent') was charged under s. 409 of the Penal Code. The respondent claimed trial to the charge. The trial date was fixed on 18 March 2015 to 20 March 2015.

[3] On 18 March 2015, the trial proceeded where the prosecution called three prosecution witnesses. On 19 March 2015, the prosecution continued to call two more prosecution witnesses. The prosecution, however, requested for the case to be vacated on 20 March 2015 because the second complainant (Ong Jin Ek) who was subpoenaed as witness could not attend the court as he was away in China. The learned Magistrate refused the prosecution request and ordered the prosecution to call the other available witness ie, the investigating officer of the case. On 20 March 2015, the learned Magistrate however, adjourned the case to 13 and 14 April 2015 as he intended to proceed with one older case.

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[4] At the start of the continuation of trial on 13 April 2015, before the investigating officer of the case was called to give evidence, the prosecution informed the court that Ong Jin Ek was issued with a medical certificate (the 'MC') from a private clinic which certified that he is unfit to perform his duties for two days ie, 13 April 2015 and 14 April 2015. Upon hearing this, the learned Magistrate ordered the prosecution to secure the attendance of Ong Jin Ek on 14 April 2015 despite the MC given for two days ie, 13 and 14 April 2015.

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[5] As the attendance of Ong Jin Ek could not be secured on 14 April 2015, the prosecution applied for adjournment of the case to the next date until he is available to testify in court. The learned counsel for the respondent strongly objected to this application for adjournment of the trial.

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[6] In refusing to grant the prosecution application for adjournment, the learned Magistrate directed the prosecution to close its case. He ordered both parties to file in written submission of no case to answer on or before 24 April 2015, and fixed 30 April 2015 for his decision.

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[7] On 16 April 2015, the prosecution wrote to the High Court for revision of the learned Magistrate's direction for the prosecution to close its case, hence this hearing before me on 11 May 2015.

A The Applicant's Submission

[8] In disagreeing with the direction made by learned Magistrate, the learned DPP submitted on the law regarding the power to institute and discontinue any proceedings in court. Article 145(3) of the Constitution stipulates that the Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence.

[9] The learned DPP further referred to s. 376(1) of the CPC which empowered the Attorney General who is also the Public Prosecutor to control and give direction over and in respect of all criminal prosecutions and proceedings.

[10] The learned DPP cited the case of *Karpal Singh & Anor v. PP* [1991] 2 CLJ 1458 and *Chong Fook Fatt v. PP* [2003] 8 CLJ 137 as authorities to say that the discretion of the Attorney General is unfettered and cannot be challenged, substituted or trespassed by the court.

[11] The learned DPP also referred this court to the case of *PP v. Zainuddin Sulaiman & Ors* [1986] 1 CLJ 468; [1986] CLJ (Rep) 232 where the Supreme Court had affirmed the prosecution power to decide when it should end its case.

[12] During mention before this court on the 11 May 2015, the learned DPP refuted the allegation that the MC could be obtained by paying RM10. He submitted that the truth of the contents of the MC can only be explained by the medical practitioner.

Respondent's Submissions

[13] In his oral submission, Mr Lim Heng Choo, learned counsel for the respondent submitted that such direction made by the learned Magistrate was as a result of the prosecution's inability to produce Ong Jin Ek on the 14 April 2015.

[14] Learned counsel for the respondent further submitted that the MC obtained by Ong Jin Ek was issued by a private clinic for RM10. Thus, it cannot be accepted by the court.

[15] Learned counsel for respondent also submitted that the prosecution's application for revision is an abuse of the court process to delay the ruling of no case to answer which had been fixed by the learned Magistrate.

[16] It was further submitted that the judicial process should not be thwarted by the applicant's reliance on art. 145(3) of the Federal Constitution as the judicial process should be in the full control of the court and not the prosecution. According to him, there is a timeline for a criminal trial to be completed. As such, it was submitted that the learned Magistrate was correct in ordering the prosecution to close its case and disallowing request for adjournment by the prosecution to comply with the timeline.

[17] Learned counsel for the respondent referred to the case of *Liaw Kwai Wah & Anor v. PP* [1987] 1 CLJ 35; [1987] CLJ (Rep) 163; [1987] 2 MLJ 69 in which case it was held that the High Court's power sitting in revision is discretionary and it must therefore be exercised judicially and within the limits and in the spirit of the legislation.

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Grounds Of Decision

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[18] The primary issue before the court is whether the direction made by the learned Magistrate for the prosecution to close its case was correct according to the law. The second issue is whether the MC tendered by Ong Jin Ek through the prosecution can be accepted by the court.

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[19] In the present case, it was obvious that Ong Jin Ek's MC was given for two days (13 and 14 April 2015). The learned Magistrate, however, directed the prosecution to produce Ong Jin Ek on the 14 April 2015. As he was not present on 14 April 2015, the learned Magistrate then directed the prosecution to close its case.

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[20] Now, the question is whether it was wrong for the learned Magistrate to give such directive in the circumstances of this case.

[21] In the first occasion when the learned Magistrate was informed that Ong Jin Ek was away in China, application was made by the prosecution to have the date ie, 20 March 2015 vacated but refused by the learned Magistrate. However, on the day itself ie, 20 March 2015 the case was postponed anyway for the reason that the learned Magistrate had to deal with another case which he had given priority. In other words, postponement of the trial was not a direct consequence of the prosecution's request. It was more on the court's own inability to continue the trial for the reason as stated. It was actually on the second occasion ie, 14 April 2015 that the trial could not be proceeded with as Ong Jin Ek could not be produced. Hence, the direction by the learned Magistrate for the prosecution to close its case.

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[22] The law regarding the exercise of power of revision by the High Court in respect of criminal proceeding is settled in *Goh Keat Peng v. PP* [2001] 2 CLJ 498, Zulkefli J (as he then was) said:

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It is clear that this court sitting as the High Court has the powers of revision in respect of criminal proceedings and matters in subordinate court ...

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[23] Further, in *PP v. Kulasingam* [1974] 1 LNS 118; [1974] 2 MLJ 26 where Hashim Yeop Saini J (as he then was) spoke of the object of the revisionary powers given to the High Court (at p. 26):

The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to sub-sections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of "paternal or supervisory jurisdiction" in order to correct or prevent a miscarriage of justice. In a

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- A revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice.

[24] Guided by the above principles, I now consider the complaints of the applicant. I have heard the submission by the learned DPP for the applicant and the submission by learned counsel for the respondent and I come to a finding that, it is wrong in law for the learned Magistrate to direct the prosecution to close its case bearing in mind that there is one last remaining witness, Ong Jin Ek whom prosecution wished to call. There was a valid reason for Ong Jin Ek to be absent on the 14 April 2015 for he was being issued with the MC. I am in the agreement with the learned DPP that power to institute and discontinue criminal proceeding solely in the hands of the Attorney General be the Public Prosecutor. The learned DPP (being an alter ego of Public Prosecutor) is empowered to exercise all or any rights and power vested in or exercisable by the Public Prosecutor (s. 376(3) of the CPC).

- D [25] In the case of *PP v. Zainuddin Sulaiman & Ors* [1986] 1 CLJ 468; [1986] CLJ (Rep) 232 SC, Salleh Abas LP had this to say:

E Since the Attorney General has this power exercisable at his discretion, it is not for the Court to say when the prosecution has to close its case or has to come to an end merely because it is unable to obtain a postponement in order to produce evidence which will prove the offence against the accused

[26] In the present case, there was no indication by the prosecution to close its case, but rather it was the prosecution intention to call its last witness, Ong Jin Ek if its application for adjournment was allowed. Perhaps, in my view the best thing the learned Magistrate should do is to give a short adjournment or last adjournment to enable the prosecution to produce its last witness. After all, the burden is on the prosecution to prove the guilt of the accused by adducing evidence through its witnesses before the court could come to a finding of no case to answer. In *PP v. Zainuddin Sulaiman & Ors (supra)*, it was further held:

G Moreover this burden of proof principle will be applicable only when the prosecution has called all the evidence which it wishes to produce in support of its case, including the evidence which is not capable of being produced at the trial without the necessity of a postponement.

H [27] The second issue raised by learned counsel for the respondent was pertaining to the MC which was obtained from the private clinic. Mr. Lim claimed that such MC can be obtained by merely paying RM10. This claim that Ong Jin Ek paid a minimal fee of RM10 to obtain the MC was not proven by way of evidence. Neither there was any evidence laid to prove that the MC was obtained for all intents and purposes of avoiding from giving evidence in court. Upon looking at the MC on its face value, it is clearly stated that Ong Jin Ek is unfit for the proper performance of his duties. There are remarks which specified the ailments namely “fever, headache gastroenteritis” and signed by Dr Chong Liung Kong.

[28] There is no reason to doubt the truth of the MC unless there are some evidences to prove otherwise. I believe the doctor concerned who issued the MC would be accountable to ensure the correctness of what he declared and stated in the MC therein.

[29] For all the above reasons, in exercise of my revisionary power I direct the learned Magistrate to allow the prosecution to adduce further evidence by calling its last witness, Ong Jin Ek. Parties are to appear before the learned Magistrate this morning for mention to fix the date for the continuation of trial.

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